MOTION FILED

JUL 20 1998

(5)

No. 97-2045

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

SOUTH CENTRAL BELL TELEPHONE COMPANY, *et al.*,
Petitioners,
v.
STATE OF ALABAMA AND
STATE DEPARTMENT OF REVENUE,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Alabama

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF OF *AMICUS CURIAE* COMMITTEE ON STATE TAXATION IN SUPPORT OF PETITIONERS

DIANN L. SMITH
Vice President—Counsel
JEFFREY A. FRIEDMAN *
Vice President—Counsel
WILLIAM D. PELTZ
BOBBY L. BURGNER
Chair and Vice Chair, Lawyers' Coordinating Subcommittee
COMMITTEE ON STATE TAXATION
122 C Street, N.W.
Suite 330
Washington, D.C. 20001
(202) 484-5222

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

20 pp

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

No. 97-2045

SOUTH CENTRAL BELL TELEPHONE COMPANY, *et al.*,
Petitioners,

v.

STATE OF ALABAMA AND
STATE DEPARTMENT OF REVENUE,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Alabama

---

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

The Committee On State Taxation ("COST") respectfully requests leave to file a Brief as *Amicus Curiae* in support of Petitioners. The interest of COST as *amicus curiae* is described *infra* at Brief, pp. 1. Counsel for Petitioners has consented to COST's filing of an *amicus* brief. Despite COST's qualifications to submit an *amicus* brief, Counsel for Respondents has refused to consent to the filing of such a brief. However, in the absence of such permission there are at least two reasons for granting this request.

First, with respect to the Petition filed in this case, COST has additional observations to make concerning the constitutional implications of the continued enforcement of the discriminatory Alabama franchise tax. A full exposition of the controversy of this case by interested and

eligible *amicus* is ultimately to the benefit of the Court in its administration of writs for certiorari.

Second, most COST members routinely use the abeyance procedure that is put at risk by the Alabama Supreme Court's decision. This practice is common throughout the state tax system and COST and its members are uniquely familiar with the potential effect of the Alabama Supreme Court's decision on state tax litigation everywhere.

Respectfully submitted,

DIANN L. SMITH
Vice President—Counsel
JEFFREY A. FRIEDMAN *
Vice President—Counsel
WILLIAM D. PELTZ
BOBBY L. BURGNER
Chair and Vice Chair, Lawyers' Coordinating Subcommittee
COMMITTEE ON STATE TAXATION
122 C Street, N.W.
Suite 330
Washington, D.C. 20001
(202) 484-5222

July 20, 1998

* Counsel of Record

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTRODUCTORY STATEMENT	1
INTEREST OF *AMICUS CURIAE*	1
SUMMARY OF ARGUMENT	2
SUMMARY OF THE TAX	4
ARGUMENT	5
I. THE ALABAMA FRANCHISE TAX IMPOSES A DIFFERENT AND MORE BURDENSOME FRANCHISE TAX ON OUT-OF-STATE CORPORATIONS COMPARED TO SIMILARLY SITUATED IN-STATE CORPORATIONS IN VIOLATION OF THE COMMERCE CLAUSE	5
II. ALABAMA HAS DENIED THE PETITIONERS ACCESS TO ITS COURTS UNDER THE DOCTRINE OF *RES JUDICATA* DIRECTLY IN CONTRAVENTION OF THE U.S. SUPREME COURT'S 1996 RULING THAT THIS INTERPRETATION OF *RES JUDICATA* VIOLATES THE DUE PROCESS CLAUSE	8
CONCLUSION	14

TABLE OF AUTHORITIES

CASES	Page
ANR Pipeline Co. v. Kan. Director of Property Valuation, 513 U.S. 917 (1994)	2
Barclays Bank PLC v. Franchise Tax Bd., 512 U.S. 298 (1994)	2
Boston Stock Exch. v. State Tax Com., 429 U.S. 318 (1977)	6
Chemical Waste Management, Inc. v. Hunt, 504 U.S. 334 (1992)	5
Fulton Corp. v. Faulkner, 516 U.S. 325 (1996)	3, 6, 7, 9
General Motors Corp. v. Tracy, 519 U.S. 278 (1996)	2
Geoffrey, Inc. v. S.C. Dep't of Revenue and Taxation, 510 U.S. 992 (1993)	2
GMC v. Kansas City, 516 U.S. 909 (1995)	2
Harper v. Virginia Dep't of Taxation, 509 U.S. 86 (1993)	13
H. P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 525 (1949)	6
Koch Fuels v. Clark, 117 S. Ct. 301 (1996)	2
NACCO Indus., Inc. v. Tracy, 118 S. Ct. 882 (1998)	2
Newsweek, Inc. v. Florida Dep't of Revenue, 118 S. Ct. 904 (1998)	2, 13
Oregon Waste Systems, Inc. v. Department of Envtl. Quality, 511 U.S. 93 (1994)	2, 6, 7
Reich v. Collins, 513 U.S. 106 (1994)	2
Richards v. Jefferson Cty., Al., 517 U.S. 793 (1996)	3, 12, 13
Thiokol Corp. v. Mich. Revenue Div., 117 S. Ct. 2448 (1997)	2
White v. Reynolds Metals Co., 558 So. 2d 373 (Ala. 1989), *cert. denied*, 496 U.S. 912 (1990)	7, 8, 9

OTHER AUTHORITIES	
Tax Injunction Act, 28 U.S.C. § 1341	14
Ala. Code § 40-14-40 (1993)	4
Ala. Code § 40-14-41 (a)	4
Ala. Code § 40-14-41 (b)	4
Mich. Comp. Laws § 205.27a (6) (1997)	10
N.C. Gen. Stat. § 105-267 (1997)	10

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

No. 97-2045

SOUTH CENTRAL BELL TELEPHONE COMPANY, *et al.*,
Petitioners,
v.
STATE OF ALABAMA AND
STATE DEPARTMENT OF REVENUE,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Alabama

BRIEF OF COMMITTEE ON STATE TAXATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

INTRODUCTORY STATEMENT

This brief is submitted by the Committee On State Taxation as *amicus curiae* in support of the Petitioners in the above captioned matter.*

INTEREST OF *AMICUS CURIAE*

The Committee On State Taxation ("COST") is submitting this brief because its members have expressed significant concern over the procedural ramifications to state tax appeals if the Alabama Supreme Court's and

* No Counsel for a party authored this brief in whole or in part, and no person or entity other than *amicus curiae*, its members or counsel has made a monetary contribution to the preparation or submission of this brief. Petitioners have consented to the filing of this brief and their letters have been filed with the Clerk of this Court. Respondents have denied consent.

Circuit Court's decisions are embraced. COST's membership consists of over 500 multistate corporations involved in interstate and international commerce. COST is a nonprofit trade association that was organized in 1969 as an advisory committee to the Council of State Chambers of Commerce and was separately incorporated on January 1, 1992. COST's objective is to preserve and promote equitable and non-discriminatory state and local taxation of multi-jurisdictional business entities. In the last five years, COST has filed at least ten briefs with this Court expressing its concern over other discriminatory and unconstitutional state tax systems.[1] Many of COST's members are engaged in business in the State of Alabama and, thus, have a particular interest in the validity of Alabama's franchise tax system. Further, the Alabama courts' expansive application of the doctrine of *res judicata* directly challenges many members' historic approach to the management of tax litigation in Alabama and elsewhere. Finally, all COST members are injured by unconstitutional state burdens on interstate commerce through increased costs and decreased market access.

SUMMARY OF ARGUMENT

In a case in which there are controlling and dispositive United States Supreme Court decisions supporting the Petitioners on all issues raised, the Alabama courts have performed the inconceivable and nevertheless denied relief. The Alabama courts' decisions represent a direct challenge to this Court's authority and should be examined to clearly

[1] *E.g., NACCO Indus., Inc. v. Tracy*, 118 S. Ct. 882 (1998); *Newsweek, Inc. v. Florida Dep't of Revenue*, 118 S. Ct. 904 (1998); *Koch Fuels v. Clark*, 117 S. Ct. 301 (1996); *Thiokol Corp. v. Mich. Revenue Div.*, 117 S. Ct. 2448 (1997); *General Motors Corp. v. Tracy*, 519 U.S. 278 (1996); *GMC v. Kansas City*, 516 U.S. 909 (1995); *ANR Pipeline Co. v. Kan. Director of Property Valuation*, 513 U.S. 917 (1994); *Barclays Bank PLC v. Franchise Tax Bd.*, 512 U.S. 298 (1994); *Reich v. Collins*, 513 U.S. 106 (1994); *Geoffrey, Inc. v. S.C. Dep't of Revenue and Taxation*, 510 U.S. 992 (1993).

reaffirm the protections afforded taxpayers under the Commerce and Due Process clauses of the United States Constitution.

In yet another sequel to Alabama's enduring antipathy toward taxpayer rights, the Alabama courts have refused to invalidate Alabama's franchise tax which on its face imposes a different tax system on out-of-state companies than on in-state companies and which in fact imposes a higher incidence of tax on out-of-state companies than on in-state companies. Such decisions are directly at odds with decades of U.S. Supreme Court precedent, including *Fulton Corp. v. Faulkner*, 516 U.S. 325 (1996), holding that under the Commerce Clause a state may not discriminate in its tax system in favor of local companies over out-of-state companies. Further, the Alabama Supreme Court's affirmance of the Circuit Court's decision that the Petitioners' claims were barred on *res judicata* grounds abrogates the Petitioners' constitutional right under the Due Process Clause to a day in court. The Petitioners were not parties to the case allegedly precluding their claim and had no legal relationship with the parties that were involved in the earlier case. The Alabama courts' decisions blatantly reject *Richards v. Jefferson Cty., Al.*, 517 U.S. 793 (1996), a decision in which this Court only two years ago instructed the Alabama courts that they cannot rely on *res judicata* if the cases at issue did not involve the same taxpayers.

Petitioners, and in fact all taxpayers, have been sorely injured by the Alabama courts' continued disregard of clearly defined constitutional rights to a hearing and freedom from discrimination against interstate commerce. The Alabama courts have effectively notified Petitioners, and everyone else, that taxpayers cannot rely on constitutional protections in the Alabama courts and that Alabama may impose shamelessly unconstitutional taxes without any form of redress to the aggrieved taxpayers. The rule for Alabama as interpreted by the Alabama courts appears to be "Heads I win, tails you lose". This is *not* how the

United States Constitution and legal system were meant to operate and this is therefore not only a worthy case for this Court to consider, but perhaps a necessary case to preserve order and faith in the system.

SUMMARY OF THE TAX

Alabama's corporate franchise tax applies a different tax base and a different tax rate to out-of-state corporations than to in-state corporations. In-state corporations (corporations incorporated in Alabama)[2] are subject to franchise tax solely on the par value of their stock. Ala. Code § 40-14-40 (1993) (the rate is $10 per $1,000). Par value is a figure chosen by the issuer (*i.e.*, taxpayer) and is basically an artificial amount, generally unrelated to either the actual capital of a corporation or the original investment in a corporation. As a result of par value constituting the entire base of the tax for in-state corporations and the value being a number assigned by the taxpayer, in-state corporations have virtually carte-blanche to determine their own Alabama franchise tax burden.

On the other hand, out-of-state corporations (corporations incorporated in states other than Alabama)[3] are taxed on their actual capital employed in Alabama. § 40-14-41(b) (the rate is $3 per $1,000). "Actual capital" includes: (a) outstanding capital stock; (b) surplus and undivided profit; (c) long-term debt; (d) certain related party debt; and (e) accelerated depreciation. *Id.* Inasmuch as the amount of capital a corporation employs in Alabama is dictated by business decisions generally independent of tax decisions, out-of-state corporations are not able to manipulate their franchise tax base in Alabama. The predictable result of such a tax system is that out-of-state corporations typically pay more franchise tax than if they had been incorporated in Alabama.

---

[2] Ala. Code § 40-14-40 (1993).

[3] Ala. Code § 40-14-41(a).

ARGUMENT

I. THE ALABAMA FRANCHISE TAX IMPOSES A DIFFERENT AND MORE BURDENSOME FRANCHISE TAX ON OUT-OF-STATE CORPORATIONS COMPARED TO SIMILARLY SITUATED IN-STATE CORPORATIONS IN VIOLATION OF THE COMMERCE CLAUSE.

There can no longer be any genuine argument that the Alabama franchise tax is constitutional under the Commerce Clause. Petitioners have fully explained the reasons that the Alabama franchise tax is unconstitutional and *amicus* will not repeat their arguments here. *See Petitioners' Brief*, pp. 24-28. However, *amicus*, as an organization devoted to the abolition of discriminatory state taxes, will briefly outline what it sees as the bright-line rules this Court has declared establish a non-discriminatory tax and how the Alabama franchise tax has violated those rules.

On its face, the Alabama franchise tax impermissibly discriminates between out-of-state and in-state corporations in violation of the Commerce Clause. A tax is discriminatory if it "tax[es] a transaction or incident more heavily when it crosses state lines than when it occurs entirely within the State." *Chemical Waste Management, Inc. v. Hunt*, 504 U.S. 334, 342 (1992). The Alabama franchise tax employs two different tax bases and which tax base a taxpayer is subject to is dependent entirely on which side of the Alabama state line a corporation is incorporated. For taxpayers incorporated in Alabama, the tax base consists of an arbitrary measurement unrelated to actual business activity and controlled and chosen by the taxpayer itself. For taxpayers incorporated outside Alabama, the tax base is computed based on the taxpayer's capital in Alabama which is dictated by business decisions. This statutory distinction creates an incentive for taxpayers to incorporate within Alabama and punishes those taxpayers who incorporate elsewhere. This Court has repeatedly stated

that facial discrimination against interstate commerce is virtually *per se* invalid, *see e.g., Fulton Corp.*, 516 U.S. at 331; *Oregon Waste Systems, Inc. v. Department of Envtl. Quality*, 511 U.S. 93, 99 (1994), and, as such, the Alabama franchise tax must be unconstitutional.

The Alabama franchise tax also discriminates *in fact* against out-of-state corporations. This Court has a clear substantive rule that "no State, consistent with the Commerce Clause, may impose a tax which discriminates against interstate commerce . . . by providing a direct commercial advantage to local business." *Boston Stock Exch. v. State Tax Com.*, 429 U.S. 318, 329 (1977) (citations omitted). The record below, as specifically adopted by the Alabama Circuit Court, *see Petitioners' Appendix B*, 21a-22a, proves that the Alabama franchise tax imposes a higher level of taxation on out-of-state corporations than would be imposed on such corporations if they were in-state corporations. As in all of the other discrimination cases addressed by this Court, the "obvious effect of the tax is to extend a financial advantage [to the in-state corporations] at the expense of the [out-of-state corporations]." *Id.* at 331. This higher level of taxation directly and negatively affects an out-of-state corporation's profits and pricing.[4] Such blatant discrimination has never been tolerated by this Court and should not now be silently condoned.

Further, it is now clear that Alabama's franchise tax cannot be supported under the compensatory tax doctrine. In *White v. Reynolds Metals Co.*, 558 So. 2d 373 (Ala. 1989), *cert. denied*, 496 U.S. 912 (1990), the Alabama Supreme Court previously had a chance to review the Alabama franchise tax and ultimately found the tax constitutional because, among other justifications, any discrimination could be absolved since it compensated for the domestic shares tax paid by in-state corporations. This ruling is no longer valid (if it ever was) because of this Court's subsequent holding in *Fulton Corp. v. Faulkner*, 516 U.S. 325. In *Fulton*, this Court specifically stated that a tax on corporate stock was not the functional equivalent of an income tax on the issuer and, thus, the compensatory tax doctrine did not apply. This Court went on to state that "we doubt that [a showing of the requirements of the compensatory tax doctrine] can ever be made outside the limited confines of sales and use taxes." *Id.* at 344. If such a showing ever could be made, it was not made here as Alabama offered absolutely no proof as to the actual economic equivalency of the foreign franchise tax and the domestic shares tax.[5] Thus, even the holding in *Reynolds* on which the Alabama Supreme Court relies to deprive the Petitioners relief is unquestionably unsound.

---

[4] COST's members have repeatedly expressed disbelief that a tax which so blatantly puts out-of-state corporations at a competitive disadvantage by increasing their cost vis-à-vis in-state corporations is still being enforced. The foundation for the Commerce Clause has always been to foster an open market between the states. Such a market can only exist through free and unburdened competition. This Court has consistently recognized the importance of competition to our national economy and the contributions of the Commerce Clause to the cultivation of competition. *See H. P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 539 (1949) ("Our system, fostered by the Commerce Clause, is that every farmer and every craftsman shall be encouraged to produce by the certainty that he will have free access to every market in the Nation, that no home embargoes will withhold his exports, and no foreign state will by customs duties or regulations exclude them. Likewise, every consumer may look to the free competition from every producing area in the Nation to protect him from exploitation by any. Such was the vision of the Founders; such has been the doctrine of this Court which has given it reality"). To the extent that a company incorporated outside of Alabama pays more in tax than a company incorporated within Alabama, competition is diminished and another step is taken toward state economic balkanization.

[5] See *Petitioners' Brief* at pp. 26-28 for an application of the three requirements for a compensatory tax under *Oregon Waste Sys., Inc. v. Department of Envtl. Quality*, 511 U.S. 93, 103 (1994).

In sum, the Alabama franchise tax is unconstitutional under the Commerce Clause because it imposes, both on its face and in fact, a greater burden on out-of-state corporations than on in-state corporations with no equivalent in-state tax to compensate for this burden. The tax is a classic example of a discriminatory tax and is therefore abhorred by this Court's constitutional jurisprudence.

II. ALABAMA HAS DENIED THE PETITIONERS ACCESS TO ITS COURTS UNDER THE DOCTRINE OF *RES JUDICATA* DIRECTLY IN CONTRAVENTION OF THE U.S. SUPREME COURT'S 1996 RULING THAT THIS INTERPRETATION OF *RES JUDICATA* VIOLATES THE DUE PROCESS CLAUSE.

The Petitioners were apparently unable to invalidate the Alabama franchise tax, not because they failed to prove discrimination, but because the Alabama courts found that under the doctrine of *res judicata* a decision in an earlier case involving a different taxpayer precluded a decision on the merits in Petitioners' case. *Amicus* fears that the practice followed by the Petitioners of holding their case in abeyance pending the resolution of a lead case, which is standard practice in the state tax controversy area, led to the *res judicata* ruling. Such a ruling directly, unnecessarily, and unconstitutionally threatens the continued use of this practical procedure.

The procedural issue that *amicus* is concerned about arose because one of the Petitioners asked to hold its case in abeyance until a case that was ahead of it procedurally, *White v. Reynolds Metals Co.*, 558 So. 2d 373, was finally determined. The affected Petitioners agreed to this procedure because there was a possibility that the *Reynolds* case would resolve the constitutionality of the Alabama franchise tax and make further taxpayer litigation unnecessary. This procedure saved money and time for both the Petitioners and the Alabama Department of Revenue. Ultimately, the Alabama Supreme Court determined in *Reynolds* that the Alabama franchise tax was constitutional and, thus, ruled against the taxpayers. This Court denied *certiorari* in *Reynolds*, 496 U.S. 912 (1990), and the Alabama Supreme Court decision became the final adjudication of that case.

Following the final determination of the *Reynolds* case, several distinguishing events occurred that differentiated the Petitioners' case from *Reynolds*. First, the Petitioners completed an extensive statistical study that proved that out-of-state corporations in fact paid more franchise tax than in-state corporations. This study and its conclusion were adopted as a finding of fact by the Alabama Circuit Court; thus, its validity is no longer in question. *See Petitioners' Appendix B*, 21a-22a. Such a study had not been undertaken by the taxpayers in *Reynolds*. Second, this Court decided several pivotal Commerce Clause cases, including *Fulton*, emphasizing that no discrimination was tolerable under the Commerce Clause and that the compensatory tax doctrine was to be narrowly applied. Notwithstanding the lack of connection between the Petitioners and the taxpayers in *Reynolds*, the Alabama courts have nevertheless refused to invalidate the tax based on the merits because the courts found that as a result of *Reynolds*, Petitioners' claims were precluded under the doctrine of *res judicata*.

Amicus is concerned that the procedure of holding a case in abeyance while another case finishes the appellate process was the reason that the Petitioners were found to be barred by *res judicata*. One judge in the majority specifically characterized this procedure as the basis for his decision. *Opinion of Justice Maddox* (concurring specially). Holding a case in abeyance pending a decision in a lead case is a common practice utilized by taxpayers and taxing authorities alike to preserve resources and allow for the orderly administration of taxes. Typically, a taxpayer whose case is being held in abeyance does not participate in any way with the lead case. In most circumstances, the lead case is adequately presented and the

decision in that case resolves all issues for the remaining taxpayers. In these cases, the losing parties will usually withdraw the remaining claims. However, in some cases, as represented here, factual or legal distinctions are raised that differentiate a pending case from the lead case. When this happens, taxpayers expect to and in fact have been able to proceed with their own case. Inasmuch as parties to cases procedurally behind a lead case do not know until the lead case has been finally determined whether further litigation will be needed, such parties do not have sufficient information at the beginning of their case to choose whether to be bound by the lead case or to proceed independently with their own. The system of holding a case in abeyance without forfeiting the right to pursue one's own case strikes the appropriate balance between judicial economy and the preservation of the right to a hearing. The Alabama courts' decisions have disrupted this balance.

The ability to hold a case in abeyance without forfeiting the right to pursue the case in court is necessary for the rational operation of the courts. Frequently, when a tax is challenged as invalid, a significant number of taxpayers will file refund claims to protect their interest in the event that the tax is struck down. At the same time, the taxing authority will continue to assert the validity of the tax and issue assessments against those taxpayers who do not comply. Such claims and assesments must be filed before the conclusion of the lead case because the statute of limitations on the refunds and assessments would otherwise expire.[6] If the taxing authority is required to litigate each of these claims in full while waiting for the lead case to be decided, then the tax authority will be quickly over-

[6] The need for taxpayers to file a protective refund claim before challenges to the tax have reached fruition has recently been exacerbated by the trend among the states to impose very short statute of limitations on such claims. *See, e.g.*, Mich. Comp. Laws § 205.27a(6) (1997) (90 days); N.C. Gen. Stat. § 105-267 (1997) (30 days).

whelmed by the volume of cases involving one, isolated issue. Even if only a few cases are pursued, this will lead to an increased burden on strained government staffs. The administrative and judicial tribunals responsible for hearing the refund cases and appeals will similarly be overwhelmed with a burdensome case load. Finally, it is a financial drain on both taxpayers and the tax authority to litigate each case rather than waiting for the ultimate outcome of one lead case.

It is *amicus's* experience that absent intervention by this Court, Alabama's interpretation of *res judicata* will be adopted by other states and taxpayers will be forced to protect their interests in all jurisdictions, not just in Alabama. If an interpretation that a taxpayer has agreed to be bound by a prior taxpayer's case by merely agreeing to hold a case in abeyance, regardless of the facts in that case or intervening contrary decisions, is not explicitly invalidated, taxpayers will pursue their cases rather than hold them even though to do so may be a repetitive exercise resulting in a waste of taxpayers' and government's time.

As a result of the Alabama courts' decisions below, judicial and economical savings through the abeyance procedure will be unavailable to the sensible taxpayer. No informed taxpayer will agree to hold a case in abeyance knowing that such a move may effectively foreclose the opportunity to litigate one's own facts, under one's own legal theories, with one's chosen legal counsel. Thus, from a practical standpoint, the anticipated effect of the Alabama courts' decisions is patently unworkable and could lead to disruption in the tax judicial system.

From a legal perspective, the Alabama courts have confused the doctrine of *res judicata* with the concept of precedent and *stare decisis*. The *Reynolds* case did precede the Petitioners' case and in the absence of distinguishing precedent or facts could have been a legal basis for a ruling against the Petitioners on the merits. The Alabama courts have prevented the Petitioners from receiving a rul-

ing on the merits on the theory that Petitioners' claims are actually precluded by *Reynolds*. Neither claim nor issue preclusion can possibly apply as between *Reynolds* and the Petitioners' case because the cases involved different taxpayers, different tax years, different facts, different proof, and new controlling precedent. Such a use of *res judicata* is not only inappropriate, it is also specifically prohibited by the Due Process Clause of the Fourteenth Amendment and by the prior decisions of this Court.

This is not the first time that Alabama has attempted to use *res judicata* to deprive taxpayers of their right to protest a tax. It is also not the first time that this Court has been asked to consider Alabama's application of *res judicata*. In *Richards v. Jefferson Cty., Al.*, 517 U.S. at 802, a case also involving Alabama taxpayers and the Alabama courts, this Court held that unrelated parties were not bound by *res judicata* principles. Notwithstanding the clear mandate in *Richards*,' the Alabama courts have failed to note any of the traditional elements of *res judicata* that this Court has accepted as fulfilling due process requirements. The Petitioners were not parties in the *Reynolds* case, had no privity with the parties in the *Reynolds* case, and did not have any special relationship with the parties in the *Reynolds* case. The taxpayers in the *Reynolds* case were not representatives of a class covering the Petitioners nor was there any special judicial procedure, such as bankruptcy, that would require the Petitioners to be bound by the judgment in *Reynolds*. The taxpayers in *Reynolds* did not consult with Petitioners regarding the case or seek in any way to determine and protect the Petitioners' interests. As such, the Alabama courts have violated the Petitioners' due process rights by binding the Petitioners to a case in which they had no legal connection.

If the Petitioners cannot challenge the Alabama tax because of *res judicata* there appears to be no party that could challenge and invalidate the illegal tax. The result is that an obviously unconstitutional tax not only remains

on the books, but continues to be enforced against all Alabama taxpayers. Currently there are numerous other taxpayers whose court cases have been put on hold until a final decision is reached in Petitioners' case. Based on the Alabama courts' reasoning, these taxpayers would be similarly precluded from pursuing their rights if the Petitioners are foreclosed from the challenge. There are also dozens of refund claims pending at the administrative level. Are each of these claims precluded under *res judicata* principles because of the *Reynolds* (and now *South Central Bell*) case? At exactly what point will a taxpayer once again be able to challenge the tax? Two years; three years; ten years from now? And, in the interim, Alabama will continue to impose and enforce its unconstitutional tax.

The importance of this case is not isolated to Alabama's apparently aberrational interpretation of *res judicata*. First, Alabama has done this before and been overruled by this Court. *Richards v. Jefferson Cty., Al.*, 517 U.S. 793. Second, the Alabama courts' decisions are merely one example of the repeated efforts of states to discover theories by which they can overcome responsibility for blatantly discriminatory state tax schemes. States have attempted to argue that even if a tax is unconstitutional, such a finding can be applied prospectively only, effectively denying relief to those challenging the tax. *See Harper v. Virginia Dep't of Taxation*, 509 U.S. 86 (1993). States have also argued that they need not offer refunds even if the only procedure for challenging a tax was to first pay the tax and then file a refund action in the state's courts. *See Newsweek Inc. v. Florida Dep't of Revenue*, 118 S. Ct. 904 (1998). This Court has repeatedly ruled against these evasive actions, although it has sometimes taken several decisions for the rule to have an effect on some state tax administrators. In each of these cases, like the case at bar, the taxes were clearly unconstitutional but the states fought to the bitter end to preserve the illegally collected revenue using procedural hurdles that have been invali-

dated by this Court. The *res judicata* theory is but another flimsy barrier erected by the states that should be discarded.

Amicus believes that it is time for this Court to send a final and unequivocal statement to the states that discriminatory taxes are intolerable and that taxpayers are entitled to relief from such taxes.[7] While this Court's prior decisions seem clear, Alabama and other similar states apparently need to be told the rules once more. In the end, and at the risk of sounding too melodramatic, this Court must maintain its vigilance in the face of repeated efforts by the states to circumvent taxpayers' constitutionally guaranteed rights. If the states do not comply and this Court does not force compliance, such rights become merely meaningless words on a piece of paper.

CONCLUSION

The Alabama courts seem oddly tone-deaf to the clear constitutional rules as set down by this Court. The persistent recalcitrance of the Alabama courts and legislature to respect the U.S. Constitution and its interpretation by this Court is the backbone of *amicus's* interest in the case. The basis for Petitioners' request for review and *amicus's* interest is *not* merely a perception that the Alabama courts made a mistake. Rather, it is a result of a repeated frustration of businesses operating within Alabama toward the cavalier and down-right hostile attitude that Alabama displays toward constitutional protections. This Court should accept this case in order to reinforce its supreme place in the land and its prior precedents in both the Commerce Clause and Due Process area.

---

[7] Such a message is particularly important in the state tax area because pursuant to the Tax Injunction Act, 28 U.S.C. § 1341, taxpayers must bring challenges to state taxes in the state courts and do not have access to the lower federal courts.

For the reasons set forth above, the Committee On State Taxation respectfully requests that the Court grant a writ of certiorari and reverse the decision of the Alabama Supreme Court.

Respectfully submitted,

DIANN L. SMITH
Vice President—Counsel
JEFFREY A. FRIEDMAN *
Vice President—Counsel
WILLIAM D. PELTZ
BOBBY L. BURGNER
Chair and Vice Chair, Lawyers' Coordinating Subcommittee
COMMITTEE ON STATE TAXATION
122 C Street, N.W.
Suite 330
Washington, D.C. 20001
(202) 484-5222

July 20, 1998

* Counsel of Record